Supreme Court, U.S.
FILED
SEP 16 1999
OFFICE OF THE CLERK

(3)

No. 99-286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

FOREST PROPERTIES, INC.,
(now known as RCK Properties, Inc.)

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICUS CURIAE TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amicus Curiae

818

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
INTEREST OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 2
CONCLUSION 5

TABLE OF AUTHORITIES

Pages

Cases

Adams Outdoor Advertising v. *City of East Lansing*, 591 N.W.2d 404 (Mich. App. 1998) 4

Concrete Pipe and Prods. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) 4

East Cape May Associates v. *State*, 693 A.2d 114 (N.J. Super. App. Div. 1997) 4

FIC Homes of Blackstone, Inc. v. *Conservation Comm'n of Blackstone*, 673 N.E.2d 61 (Mass. App. 1996), *rev. denied*, 676 N.E.2d 55 (Mass. 1997) 4

Karam v. *State*, 705 A.2d 1221 (N.J. Super. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999) 3

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987) 2, 4

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 3

Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 4

Zealy v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) .. 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

FOREST PROPERTIES, INC.,
(now known as RCK Properties, Inc.)

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

INTEREST OF AMICUS CURIAE[1]

The Texas Justice Foundation ("TJF") is a 501(C)(3) charitable non-profit organization that has as part of its mission the protection of private property rights and the free enterprise system against unconstitutional government interference. The Foundation believes in the right to own property free of excessive government regulation or confiscation and that individuals, not government, are the best protectors and

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the Texas Justice Foundation, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

decision makers for the use of all resources, both natural, man-made and intellectual. The Foundation seeks to protect, through litigation and education, those fundamental freedoms and rights essential to the preservation of American society.

SUMMARY OF ARGUMENT

The *ad hoc* approach to determining the relevant parcel of property that is the "denominator" when deciding whether substantially all use of property has been eliminated is causing great confusion among state and federal courts. The unguided state of the law allows for arbitrary determinations of what shall be the property under consideration, and alters the outcome of cases based on the individual preferences of different courts.

This case is a useful vehicle for addressing the denominator issue because it brings together a variety of state-law elements that can be used to distinguish the two pieces of property in question and that could form the basis for a workable set of rules for distinguishing separate parcels of property under the Takings Clause.

ARGUMENT

Certiorari should be granted because the Federal Circuit's holding regarding what property forms the "denominator" in Takings analysis involves an important and recurring issue causing great confusion among federal and state courts. As this Court observed over ten years ago:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (*quoting* Frank I. Michelman, *Property,*

Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967)).

This Court recognized the continuing difficulty of the denominator issue in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n. 7 (1992), but has yet to resolve the matter. As noted in the petition, the continuing uncertainty over this issue has resulted in a variety of inconsistent approaches that can often change the outcome of a case. In addition to the conflicting decisions cited by petitioners, numerous other courts have confronted the denominator issue with varying results and analyses.

In *Karam* v. *State*, 705 A.2d 1221 (N.J. Super. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999), the intermediate appellate court addressed the denominator issue in the context of two commonly owned parcels of land, a riparian parcel and the adjacent upland parcel. Despite recognizing that "the upland and riparian parcels have consistently been delineated as separate lots on the municipal tax map and in the various deeds executed over the years," 705 A.2d at 1223, the court held that the "the adjoining upland and riparian lands must be considered a single property unit" *id.* at 1228. The court acknowledged that the law was "unsettled" regarding the denominator issue, and that its decision on the issue would be dispositive as to whether all use of the property had been eliminated. *Id.* at 1227. Given the uncertainty and the lack of any guidance, the court resorted to a "flexible approach" to the "fact-sensitive question" and grouped the two parcels together in order to defeat the Taking claim. *Id.* at 1226-28 (citations and internal quotation marks omitted).

In *Zealy* v. *City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996), the Wisconsin Supreme Court recognized the denominator problem in Takings jurisprudence and then rejected the lower court's approach "that a landowner's anticipated investment opportunities should be examined in order to determine what the parcel at issue should be." The Wisconsin Su-

preme Court then read U.S. Supreme Court precedents as never endorsing "a test that 'segments' a contiguous property to determine the relevant parcel" but rather requiring that "a landowner's property in such a case should be considered as a whole." *Id.* In discussing the denominator issue, the Wisconsin Supreme Court dismissed footnote 7 of *Lucas* as dicta and relied on the earlier cases of *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-31 (1978) and *Keystone Bituminous Coal*, 480 U.S. at 498, and the later case of *Concrete Pipe and Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 642-44 (1993). *Zealy*, 548 N.W.2d at 532-33.

Other state court cases have similarly noted the confusion surrounding the denominator issue and simply muddled through as best they could. *See, e.g., FIC Homes of Blackstone, Inc.* v. *Conservation Comm'n of Blackstone*, 673 N.E.2d 61, 67 & n. 12 (Mass. App. 1996) (treating as a single "parcel" for the denominator 38 separate lots that were purchased in one transaction by plaintiff developer but separately sold to homeowners, and assessing "over-all estimated loss, when considering the project as a whole"), *rev. denied,* 676 N.E.2d 55 (Mass. 1997); *Adams Outdoor Advertising* v. *City of East Lansing*, 591 N.W.2d 404, 411-12 (Mich. App. 1998) (rejecting City's bold claim that denominator should be plaintiff's aggregate property in the "entire Lansing metro market" but seeming to favor in dicta a common ownership/contiguity rule); *East Cape May Associates* v. *State*, 693 A.2d 114, 119, 128 (N.J. Super. App. Div. 1997) (recognizing the "presently unsettled state of New Jersey and Federal law" regarding the denominator issue and remanding for further factual development regarding the State's claim that the denominator should include a separate tract of land across a county road allegedly having common beneficial ownership).

Further guidance on this issue is necessary because the current *ad hoc* approach invites the arbitrary imposition of an individual court's preference as to who should pay for a given piece of social policy rather than requiring a reasonably pre-

dictable application of law. Property law in general, and Takings law in particular, is fundamentally concerned with protection of established economic rights. Allowing various courts to avoid predictable state-law distinctions between separate pieces of property undermines both property and constitutional law. Such an approach forces owners to guess whether a given piece of property will be aggregated with others and thus subject to uncompensated taking, or whether it will be accepted as distinct and thus protected from government confiscation. What is needed is a clearer line as to when property will be treated separately or in the aggregate so that business may structure their affairs accordingly and have reasonable confidence as to how their property will be treated when the government chooses to eliminate the utility of a given parcel without formal condemnation.

Finally, this case is a useful vehicle through which the Court can address the denominator issue. There are multiple state-law bases for distinguishing the riparian and the upland properties in this case. The Court thus can choose among distinctions based on the nature of the two properties (option right versus a fee simple interest), the different jurisdictions in which each property is situated, different times of purchase of the properties, different owners of the fee in the two parcels, and different development rules governing the different parcels. Any one or several of these state-law distinctions between the properties could serve as the basis for a new and clear rule regarding when separate properties should or should not be aggregated for purposes of forming the denominator in the Takings equation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amicus Curiae

Dated: September 16, 1999.